No. 10,488

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE ROBERT GUTMAN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

The facts set forth by the appellant relative to the pleadings in this case are correctly stated.

The following is a brief statement of the essential facts disclosed from the evidence introduced at the trial:

The appellant, born March 15, 1924, registered for Selective Service with Local Board No. 86, San Francisco, California, on July 6, 1942. (T. p. 11.) He filed his questionnaire with his said Local Board on September 11, 1942. In his questionnaire he stated that he had been a minister of Jehovah's Witnesses since August 1, 1939 (T. p. 27) and claimed exemption from service in the armed forces on the grounds of such ministry. (T. p. 32.) The Local Board rejected his

claim and on November 23, 1942 unanimously classified him in Class I-A and thereafter on December 10, 1942 mailed him a notice of such classification. (T. p. 43.) The appellant's name did not appear on the certified list of Jehovah's Witnesses. (T. pp. 45 and 51.) The appellant wrote a letter to the Board on December 17, 1942 requesting a personal hearing and such hearing was granted and held on December 21, 1942 before the entire Board membership. (T. pp. 65, 66 and 68.) After the hearing the Board notified the appellant that their decision was unchanged. On December 21, 1942 the appellant filed an appeal from the decision of the Local Board to the Board of Appeal. (T. p. 34.) On February 10, 1943 the Appeal Board unanimously affirmed the decision of the Local Board and the appellant was notified of such action. (T. p. 34.) Thereafter appellant wrote letters to both the State Headquarters and the National Headquarters of Selective Service seeking recognition of his claim for exemption (T. pp. 81 through 90) but after a review of the matter, both State and National headquarters refused to take affirmative action on behalf of the said appellant. (T. p. 57.) On May 1, 1943 the Local Board mailed to appellant an order to report for induction into the armed forces of the United States at San Francisco, California, on the 14th day of May, 1943. (T. p. 59.) Appellant did not comply with this order. (T. p. 61.) Appellant admitted the receipt of the order to report for induction. (T. p. 68.) The appellant was sent a notice of delinquency on May 15, 1943, to which he replied that he could not report because he was an ordained minister of the

gospel. (T. pp. 61 through 65.) Appellant also stated that he was unwilling to be inducted for non-combatant military service or to go to a camp for conscientious objectors. (T. p. 69.) It was because of this failure to comply with the order of induction that he was indicted for a violation of the Selective Training and Service Act of 1940, as Amended. (50 USCA, Section 311.)

THE ISSUE.

All of the appellant's assignments of error raise but a single issue, which we believe may be fairly and correctly stated as follows:

May a defendant who has been indicted for his failure to report for induction into the armed forces of the United States, defend such failure in a criminal prosecution by collaterally attacking the Board's administrative acts?

POSITION OF THE GOVERNMENT.

The answer to the above stated question is: "No".

ARGUMENT.

The issue above stated is precisely the one considered by the Supreme Court of the United States in the case of

Falbo v. The United States of America, decided January 3, 1944, (No. 73, October term 1943),

in which the said Court affirmed the conviction of the appellant. In its decision the Supreme Court said:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for willful violation of an order directing a registrant to report for the last step in the selective process. We think it has not."

To the same effect see also:

United States v. Bowles, 131 F. (2d) 818, (CCA-3), affirmed on another ground, 319 U.S. 333;

United States v. Grieme, 128 F. (2d) 811 (CCA-3);

Fletcher v. United States, 129 F. (2d) 262 (CCA-5);

United States v. Kauten, 133 F. (2d) 703 (CCA-2);

United States v. Mroz, 136 F. (2d) 221 (CCA-7).

On authority of the decision of the Supreme Court of the United States in the *Falbo* case appellee rests his case.

Counsel for the appellant makes no mention of the *Falbo* case in his opening brief dated January 14, 1944. Certainly he can not deny its relevancy in the case at bar. It therefore can reasonably be assumed that his brief must have been in the hands of the printer before appellant learned of the decision in the *Falbo* case.

In closing, the appellee calls attention to the case of *United States v. John Gilbert Laier* (decided November 8, 1943 by St. Sure, District Judge, Northern District of California), cited by the appellant in his brief, on pages 15 and 19, and on which the said appellant places great reliance. The *Laier* case and the case at bar may be distinguished because in the *Laier* case the defendant was refused a personal hearing, while in the case of the appellant, such a hearing was accorded him, and there is nothing in the record to show that the hearing was a "farce", as the appellant describes it in his brief, because, as the board members testified (and there is no reason why they should not be believed), the appellant did have a full and fair hearing.

Assuming, however, for the sake of argument, and for the sake of argument alone, since the facts do not justify the conclusion that the appellant's hearing was, as he described it, a "farce", or let us even go further and assume that, as in the *Laier* case, there was an outright refusal to grant a personal appearance, it is nevertheless the contention of the appellee that the decision of the Supreme Court in the *Falbo* case is authority for the proposition that such a defense may not be properly raised in a prosecution for violation of the Selective Training and Service Act of 1940.

CONCLUSION.

Accordingly we respectfully submit that the judgment of the District Court was correct and it should be affirmed.

Dated, San Francisco,
February 14, 1944.

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